American Arbitration Association

TEAMSTERS, LOCAL 117,	
Union,	**AAA Case No. 75 L 390 00153 99**
and	**Decision & Award**
THE CITY OF KENT,	
Employer.	
(William Price Termination)	

I. INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the TEAMSTERS LOCAL 117 (hereinafter the UNION), and the CITY OF KENT (hereinafter the CITY), under which DAVID GABA was selected to serve as Arbitrator and under which his Award shall be final and binding among the parties.

A hearing was held before Arbitrator Gaba on Monday, November 22, and Tuesday, November 23, 1999 at the Regional Justice Center, Kent, WA. The parties had the opportunity to examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. Robert H. Lewis & Associates provided a transcript of the proceedings. Both parties filed post-hearing briefs on or about January 25, 2000.

APPEARANCES:

On behalf of the Union:

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On behalf of the City:

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II. ISSUES

Teamsters, Local 117 and the City of Kent are parties to a collective bargaining agreement dated January 1, 1997 through December 31, 1999.[1] The parties have a dispute regarding the interpretation and application of that agreement as it relates to the City's decision to terminate William G. Price, a bargaining unit employee.

The parties stipulate to the following statements of the issues:

1. Did the Employer have just cause to terminate William Price for his failure to attend the meetings on June 16, 1999?

2. If not, would there have been just cause to terminate Mr. Price anyway?

3. If there was not just cause to terminate Mr. Price, what is the appropriate remedy?

[1] Joint Exhibit 1, at 1.

III. CONTRACT PROVISIONS

The agreement between the City of Kent and the Union states that the City and the Union "agree that the efficient and uninterrupted performance of municipal functions is a primary purpose of the agreement."[2] Mr. Price was represented by the Union, which was "the exclusive bargaining representative for all regular full-time ... employees".[3]

Under **Section 7.3 - Meetings Relative to Discipline**, the agreement states:

> In the event the Employer requires an employee to attend a meeting for purposes of discussing an incident which may lead to suspension, demotion or termination of that employee, the employee shall be advised of his right to be accompanied by a representative of the Union. If the employee desires Union representation in said matter, he shall notify the Employer at that time and shall be provided a reasonable time to arrange for Union representation.[4]

The agreement, under **Section 8.1 – Work Stoppages**, further states that the Union:

> …[S]hall not cause or condone any work stoppage . . . or other interference with City functions by employees under this Agreement and should same occur, the Union agrees to take appropriate steps to end such interference.[5]

The agreement also states that any employee who commits any act prohibited in this article will be "subject to penalties including discharge." Under **Article 11-Management Rights**, the agreement continues by stating that "the Union recognizes that the City retains the exclusive rights to manage its business including . . . to discipline, suspend and discharge employees for just cause. . . ."[6]

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[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*., at 9.
[6] *Id*., at 11.

Section 7.2 - Disciplinary Action by the Employer, states, "In no event shall the agreement between the City and the Union alter or interfere with disciplinary procedures heretofore followed by the City or provided for by City Charter, Ordinance, or law including the procedure for appeals thereof." [7]

In addition to the agreement between the City and the Union are the requirements of the Kent City Policy which states:

> **City Policy 2.14, <u>Code of Conduct</u>**, prohibits:(1) unauthorized absences from work; (2) threatening violence or assaulting others during the performance of duties; (3) serious or repeated disorderly conduct in the workplace; (4) insubordination towards a supervisor, which includes, but is not limited to, the refusal, disregard, or failure to obey directives, instructions, or orders.[8]

City Policy 6.7, <u>Workplace Violence</u>, is violated by committing acts of violence, which are defined as:

> (1) threatening conduct, consisting of a communicated or perceived threat to harm another or in any way endanger the safety of another, or (2) obsessively directed conduct, i.e. intensely focused on a grudge, grievance, or romantic interest in another employee, or (3) conduct which is threatening or violent.[9]

IV. FACTS

William G Price was hired by the City of Kent on October 16, 1988 as a lead mechanic. His title changed to shop supervisor and he held essentially the same position throughout his 10 years of employment. Mr. Price did not receive any discipline before

[7] *Id.,* at 9
[8] Exhibit E12
[9] Exhibit J46.

Steve Hennessey was hired as fleet superintendent on January 1, 1996.[10] Mr. Hennessey was Mr. Price's direct supervisor. Mr. Hennessey had been either a supervisor or manager in a fleet services department for the past 18 years.[11] From the time that Mr. Hennessey was hired, Mr. Price and Mr. Hennessey had difficulty in their working relationship.[12]

The History Of Documented Conflicts Is As Follows:

On November 7, 1996, Mr. Hennessey took issue with Mr. Price's "negative, defensive" attitude toward him and the fact that Mr. Price had a habit of "running Mr. Hennessey down" in front of his staff. As a result, Mr. Hennessey instructed Mr. Price to work with him to improve the operation of the department, not to retain a negative attitude, and to be supportive of the management team. [13]

Bill Stephens, a subordinate of Mr. Price, was to assume the supervisory position of Mr. Price in his absence. Sometime prior to February 3, 1997, Mr. Stephens complained to Mr. Hennessey that he had been yelled at and called a liar by Mr. Price in front of other City staff who had worked at the direction of Mr. Stephens in Mr. Price's absence.[14] On February 3, 1997, Mr. Hennessey and Eddy Chu, Mr. Hennessey's supervisor, met with Mr. Price and Mr. Stephens to discuss Mr. Stephen's complaint about the insulting behavior of Mr. Price. At this meeting, Mr. Price admitted that he had called Mr. Stephens a liar in front of his staff, and at the conclusion of the meeting Mr. Price pounded his fist on the table and indicated that he felt he was getting the "short end

[10] Tr. at 438 (Price).
[11] Tr. at 21 (Hennessey).
[12] Tr. at 79, 84-85 (Hennessey).
[13] Tr. at 28 (Hennessey), Exhibit E3.
[14] Tr. at 30 (Hennessey), Exhibit E3.

of the stick".[15] Approximately two weeks later, Steve Hennessey met with Mr. Price and informed him that his anger and the pounding of his fist on the table at the meeting were not appropriate behavior.

On May 14, 1997, Mr. Hennessey noted that Mr. Price behaved in a rude manner towards him. Mr. Hennessey informed Mr. Price that disciplinary action would ensue if Mr. Price did not change his behavior. That same day, Mr. Price informed his subordinates that, in order to meet the expectations of Mr. Hennessey, he would add chargeable time to work orders even if the work had not been performed. Mr. Hennessey instructed Mr. Price to support management. Mr. Price responded that he did not want to be part of management because management would "stab him in the back."[16]

Prior to January 15, 1998, Mr. Hennessey received complaints from the Street Department and the Police Department regarding Mr. Price's exhibition of rude and abrasive behavior.[17] Mr. Price was informed that behavior of this type would not be tolerated, and on January 22, 1998, Mr. Price received a verbal reprimand.[18] Pursuant to the reprimand, Mr. Hennessey informed Mr. Price that customer service was his number one priority and that he expected Mr. Price to support management in a professional and courteous manner. Mr. Hennessy added that abrasive and rude behavior would not be accepted and Mr. Price was warned that a failure to conduct himself as expected would result in further disciplinary action.[19]

On May 20, 1998, Operations Manager Eddy Chu, Mr. Hennessey's supervisor, issued a written reprimand to Mr. Price for telephoning Mr. Hank Howe, who previously

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[15] *Id*.
[16] Tr. at 33 (Hennessey), Exhibit E3.
[17] Exhibit E3.
[18] Exhibit E5.
[19] Exhibit E6.

worked for the City.[20] Mr. Price contacted Mr. Howe after an employee in the shop named Orlin Kleven, told Mr. Price that there was something questionable about Mr. Hennessey's background. The written reprimand was the result of allegations that Mr. Price had contacted Mr. Howe, and recommended that Mr. Howe file a lawsuit against the City for hiring Mr. Hennessey.[21] Teamsters Local 117 Business Representative Ken Troup represented Mr. Price in the grievance that followed. The parties reached a resolution of the grievance that required Mr. Price to attend and complete training with a City consultant named Barry Garland in exchange for having the discipline reduced to a verbal warning. The verbal warning was issued to Mr. Price for conduct that "compromised the productive and cooperative workplace and failed to support the organizational structure in order to effectively and efficiently serve City customers."[22] This resolution was reached over the objections of Mr. Chu, who believed that the written warning should stand.[23]

It is undisputed that Mr. Price successfully completed the training with Mr. Garland.[24] In December 1998, Mr. Hennessey noted improvement in Mr. Price's customer service and interpersonal skills.[25] Mr. Price received no discipline for any customer complaints during this time. Mr. Garland stated in one of his reports to the City that the problems between Price and Hennessey were "a matter of two strong personalities having a personality clash."[26]

At the end of 1998, Mr. Hennessey revised performance reviews Mr. Price submitted for the employees he supervised. Mr. Hennessy objected to the evaluation

[20] Exhibit E8.
[21] Tr. at 421-422 (Kleven), 443-444 (Price).
[22] Tr. at 229 (Wickstrom), 362 (Troup), and Exhibit E9.
[23] Tr. at 133, 159-160 (Chu), Exhibit E24.
[24] Tr. at 49 (Hennessey), 160 (Chu), Exhibit 23.

given to Mr. Kleven. After this occurred, it is alleged that Mr. Hennessey became more hostile towards Mr. Price.[27] Mr. Hennessey states that on March 10, 1999, when he suggested more effective ways to communicate with customers, Mr. Price became upset and behaved in a rude manner. He informed Mr. Hennessey that he had a lawyer and would see him in court someday.[28] On May 27, 1999, Mr. Hennessey alleged that Mr. Price "exhibited an attitude inconsistent with the support of management and customer service and inconsistent with being an example to his subordinates." Mr. Price said that people were lying to him and that "when he got them into a corner he would let Mr. Hennessey know the outcome."[29]

In early June of 1999, three formalized complaints were made about Mr. Price's behavior.[30] The first involved an allegation made by a supervisor in the Street Department named Michael Pulliam. Mr. Pulliam was uncomfortable with Mr. Price's manner of speaking and foul language. He formalized his complaint at the request of Mr. Hennessey. Mr. Pulliam indicated that this was not an isolated incident and that in order to satisfy the employees he supervised, he had found it necessary to be the liaison between his subordinates and Mr. Price. Mr. Pulliam's subordinates did not want to be on the receiving end of Mr. Price's rude behavior.[31] Further, Mr. Pulliam had previously complained to Mr. Hennessey and Mr. Chu about Mr. Price's behavior.[32]

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[25] Tr. at 99-100 (Hennessey). Exhibit J4.
[26] Exhibit U23.
[27] Tr. at 425 (Kleven), 449 (Price).
[28] Exhibit E3.
[29] *Id.*
[30] Tr. at 93 (Hennessey), Exhibits E10-E12.
[31] Tr. at 191, 197 (Pulliam).
[32] Tr. at 198 (Pulliam).

Mr. Pulliam, on behalf of his employee Gordon Anderson, wrote the second complaint on June 3, 1999.[33] This complaint was again formalized at the request of Mr. Hennessey.[34] Mr. Price had called Mr. Anderson a "smart ass" because of Mr. Anderson's hostile, abrasive approach.[35] A neutral witness, Robert Stone, confirmed Mr. Price's testimony that Mr. Anderson approached Mr. Price in a hostile, abrasive manner and tried to "egg him on."[36]

The third complaint came from Leonard Quentin Poil, a supervisor in a division of the Parks Department, on June 4, 1999.[37] On May 28, 1999, Mr. Poil entered the shop expecting to see a double light bar installed on a truck, but Mr. Price had instead installed a single light bar.[38] Mr. Poil's concern about the interaction was solely that Mr. Price was loud and boisterous in his tone.[39] Mr. Poil's testimony is directly contradicted by the testimony of Mr. Kleven and Mr. Price.[40] Mr. Poil's supervisor Rick Weiss asked Mr. Poil to put the complaint in writing and then transmitted the complaint to Mr. Hennessey.[41] Mr. Poil made it his department's practice for Mr. Poil to be the liaison between his department and Mr. Price, as Mr. Poil's employees were not comfortable communicating with Mr. Price.[42]

After obtaining the three complaints, Mr. Hennessey requested a meeting with Employee Services to discuss how to proceed. The Employee Services representatives

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[33] Tr. at 200, 205 (Pulliam), Exhibit E12.
[34] Tr. at 214-215 (Anderson).
[35] Tr. at 222-224 (Stone), 453-454 (Price).
[36] Tr. at 222-224 (Stone), 453-454 (Price).
[37] Exhibit E11.
[38] Tr. at 263-264, 270-271 (Poil), Exhibit E11.
[39] Tr. at 273 (Poil).
[40] Tr. at 426-427 (Kleven), 252-253 (Price).
[41] Tr. at 276 (Poil), Exhibit E11.
[42] Tr. at 268 (Poil).

asked Mr. Hennessey to prepare a chronology of events involving Mr. Price. Mr. Hennessey then created a journal of events.[43]

On June 11, 1999, while in the presence of employee Scott Schroeder, Mr. Price and Mr. Hennessey got into a heated discussion about the phone and voice mail system. Mr. Price was frustrated because his previous complaints to Mr. Hennessey about the new system had not been resolved. In the course of the discussion, Mr. Price told Mr. Hennessey that he was concerned with the production of the shop, and didn't have time to "play phone tag" all day long.[44] Mr. Hennessey told Mr. Price to be patient and that the City was working on the problems.[45] Mr. Price then got out of his chair, put his finger approximately six or seven inches from Mr. Hennessey's face and told him that he had work to do and didn't have time to play phone tag.[46] Mr. Hennessey told Mr. Price not to point his finger at him. Mr. Price put his finger closer to Mr. Hennessey's nose and said, "I'm an adult, I'll put my hand where I want to." Mr. Hennessey told Mr. Price that his actions constituted insubordination, and he turned and left the office. As Mr. Hennessey left the shop, Mr. Price replied in a loud voice that this was "not insubordination and this was not the military."[47]

At some point during the confrontation, Mr. Schroeder left the room by walking in between the two men. Mr. Schroeder testified that Mr. Price, "was not . . . shouting at him, but Bill's voice carries."[48]

By all accounts the total interaction lasted about three or four minutes.[49] Mr. Price did not touch Mr. Hennessey in any way, he did not use any foul language, he made

[43] Tr. at 94-98 (Hennessey), 321-322 (Viseth), 338, 349-350 (Hoang), Exhibit U22.
[44] Tr. at 58 (Hennessey), 182 (Schroeder), 456 (Price), Exhibit E3.
[45] Tr. at 107 (Hennessey), 456 (Price).
[46] Tr. at 58-59, 107 (Hennessey), 456-7 (Price).
[47] Tr. at 59, 107 (Hennessey), 183 (Schroeder), 457 (Price).

no threat directed at Mr. Hennessey, and he made no gesture other than pointing at Mr. Hennessey's face. Although Mr. Hennessey testified that he felt threatened by Mr. Price, Mr. Hennessey did not call the police, and he returned to Mr. Price within a few minutes to give him a copy of the policy manual.[50] Mr. Hennessey returned to Mr. Price a second time, about one-half-hour later. At that point, Mr. Hennessey and Mr. Price had a brief discussion about what had occurred, and Mr. Hennessey said that Mr. Chu was going to put Mr. Price on administrative leave.[51] Shortly thereafter, Mr. Price went to Mr. Chu's office, and Mr. Chu put Mr. Price on administrative leave.[52]

The City set a meeting to investigate the complaints against Mr. Price and the incidents of insubordination towards Mr. Hennessey for June 16, 1999 at 7:30 a.m.[53] Numerous employees had already been interviewed as part of the investigation, including: Bob Stone, Bill Stephens, Pat Sims, Scott Schroeder, and Orlin Kleven.[54] In addition, there was information from Steve Hennessey, Scott Schroeder, Quentin Poil, and Mike Pulliam contained in written complaints and Mr. Hennessey's notes.[55] Mr. Price did not appear on the advice of his attorney Hollis Wayne Duncan. Mr. Duncan's concern was that Mr. Price had not been told the purpose of the meeting or the allegations against him. It was for this reason that Mr. Price did not attend.[56]

Mr. Price's union representatives did attend the 7:30 a.m. meeting. At the meeting, Teamsters, Local 117 Business Representative Ken Troup asked whether the City had informed Mr. Price that failure to attend the meeting might result in discipline.

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[48] Tr. at 183-185 (Schroeder).
[49] Tr. at 107-108 (Hennessey), 458 (Price).
[50] Tr. at 104-106 (Hennessey), 458 (Price).
[51] Tr. at 460 (Price).
[52] Tr. at 462 (Price), Exhibit J25.
[53] Tr. at 143-144 (Chu), 293 (Viseth).
[54] Tr. at 62-63 (Hennessey).
[55] Exhibits E3, E10, E11, E12, E37.

Mr. Chu may have indicated that Mr. Price had not been informed of the possible disipline. Accordingly, Mr. Troup requested that the meeting be rescheduled and that Mr. Price be informed of the consequences of failing to attend. The City agreed, and the meeting was rescheduled for the same day at 11:00 a.m.[57] The City notified Mr. Price of the 11:00 a.m. meeting and that "disciplinary action that may include termination," could result from his failure to attend. Mr. Price met with his union representatives and his attorney shortly before the 11:00 a.m. meeting.[58] Mr. Duncan advised Mr. Price to wait downstairs until Mr. Duncan and the union representatives had an opportunity to discuss the issue of whether the City would permit Mr. Duncan to be present.[59] Mr. Price waited downstairs, ready to attend when called.

At the 11:00 a.m. meeting, Mr. Troup opened with a request that Mr. Duncan be allowed to attend as an observer. Anh Hoang of Employee Services for the City indicated that Mr. Duncan would not be allowed to attend.[60] Ms. Hoang asked where Mr. Price was, to which Mr. Troup responded that Mr. Price was downstairs, waiting to be called upstairs.[61] Mr. Duncan joined the conversation, asking several questions of Ms. Hoang. At some point, Ms. Hoang broke off the conversation, and went to speak with Employee Services Director Sue Viseth.[62] Ms. Viseth entered the room, and immediately announced that the meeting was over.[63] There was no discussion of any kind with Ms. Viseth before she terminated the meeting at 11:55 a.m.[64]

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[56] Tr. at 402-403 (Duncan), 462-463 (Price).
[57] Tr. at 363 (Troup), 381 (Hanson), Exhibit U34.
[58] Tr. at 463 (Price).
[59] Tr. at 364-365 (Troup), 382-383 (Hanson), 404-405 (Duncan), 463 (Price).
[60] Tr. at 352-354 (Hoang), 366 (Troup), 383 (Hanson), 406 (Duncan), Exhibit U35.
[61] Tr. at 366, 368 (Troup), 383 (Hanson), 406 (Duncan).
[62] Tr. at 367 (Troup), 383 (Hanson), 406 (Duncan), Exhibit U35.
[63] Tr. at 298-299, 325 (Viseth), 367 (Troup), 383, 385-386 (Hanson), 407 (Duncan), Exhibit U35.
[64] Tr. at 176 (Chu), 298-299, 325 (Viseth), 356 (Hoang), 367 (Troup), 385-386 (Hanson), 407 (Duncan), Exhibit U35.

The City believed that Mr. Price was insubordinate and that he was refusing to comply with the direct orders of his supervisor by failing to attend the two meetings on June 16, 1999.

The City conducted a Loudermill hearing on June 24, 1999, which Mr. Price was directed to attend.[65] Mr. Price, who was on paid status, again disregarded the direction of his employer. Mr. Price submitted a statement in his defense in lieu of an appearance.[66] Despite his statement to the contrary, Mr. Hennessey had input in the decision-making process.[67]

Don Wickstrom, Director of Public Works for the City, determined that Mr. Price should be terminated for his failure to attend the meetings on June 16, 1999.[68] The City alleges that the unsigned document entitled "William G. Price Presented in the Defense of Second Loudermill Hearing," fails to address the specific allegations that the City had attempted to investigate as set forth in the Notice of Loudermill Hearing. Furthermore, the City claims the document demonstrates an attitude consistent with Mr. Price's lack of support of management and insubordinate behavior.[69]

IV. POSITION OF THE UNION

A. The City Did Not Have Just Cause To Terminate Mr. Price For His Failure To Attend The Meetings On June 11, 1999.

The Union argues that Mr. Price was not insubordinate when he failed to attend the two meetings held on June 16, 1999, because he was unaware of the consequences.

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[65] Exhibit E13.
[66] Exhibit U38.
[67] Tr. at 102 (Hennessey), Tr. at 244-245 (Wickstrom), and Tr. at 326 (Viseth).
[68] Tr. at 245, 248 (Wickstrom), 302-303, 328 (Viseth), Exhibit E15.
[69] Tr. at 235, Exhibits E13, E14, U38.

The Union points to the termination notice, in which the City alleges Mr. Price was insubordinate for failing to attend the two meetings. This allegation is the principle reason cited for the termination, which the Union disputes based on its definition of insubordination.[70] The Union claims that in order to establish insubordination, the employer must prove not only that the employee refused to obey a direct order, but also that the employer made the employee aware of the consequences of refusal.

With respect to the 7:30 a.m. meeting, the Union claims Mr. Price's failure to attend was not insubordinate because he had not been warned of the possible consequences of failing to attend. With respect to the 11:00 a.m. meeting, Mr. Price was prepared to attend but was advised by his private attorney to wait in a separate area. The Union claims that Mr. Price's reliance upon erroneous advice of counsel does not constitute insubordination.[71] Further, the City knew that Mr. Price was waiting downstairs, yet it was the City that unilaterally terminated the meeting. The Union again notes that the City did not notify Mr. Price, his Union representatives or his attorney that failing to attend would result in termination.[72]

B. The City Did Not Have Just Cause To Terminate Mr. Price For His Confrontation With Mr. Hennessey On June 11, 1999.

The Union asserts that Mr. Price's behavior in the incident on June 11 does not justify the immediate termination of his employment. By comparison with several other cases, the Union concludes that Mr. Price's behavior and actions were not egregious.

[70] E15, Tr. at 245 (Wickstrom).
[71] Union's Post-Hearing Brief, at 19.
[72] *Id*., at 21.

The Union states that Mr. Price did not use any foul language, and did not vilify Mr. Hennessey or use any invective that was personal towards Mr. Hennessey.[73]

Mr. Hennessey testified that although Mr. Price pointed his finger in Mr. Hennessey's face, there was no physical contact.[74] The Union argues that the absence of threats or physical contact supports the reinstatement of Mr. Price. The Union makes comparison with *Jeep Corporation*, where the employee's actions included abusive language and finger-pointing that contacted the employer.[75] Despite these actions, the arbitrator reinstated the grievant. The Union goes on to argue that the absence of contact is a strong factor in determining the severity of the penalty, and cites the arbitrator's decision in *Robertson Can Co*.:

> Here it is undisputed that there was no physical contact and no threat of physical contact in the confrontation on the sixth floor. The Grievant admittedly shook his finger at the Foreman, Adams, but this could hardly be construed as a threat.[76]

The Union claims that the length and severity of the interaction between Mr. Price and Mr. Hennessey does not support termination. The testimony showed that Mr. Price did not engage in any sort of tirade or pursuit of Mr. Hennessey; on the contrary, Mr. Price simply returned to work. The Union seeks to discredit Mr. Hennessey's testimony that he felt threatened by Mr. Price, noting Mr. Hennessey returned to Mr. Price within a few minutes to give him a copy of the policy manual.[77]

The Union also argues that Mr. Hennessey should "partner" the blame for the altercation, citing Mr. Garland's report of a personality clash between Mr. Hennessey and

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[73] Union's Post-Hearing Brief, on 23.
[74] Tr. on 105 (Hennessey).
[75] *Jeep Corporation*, 91 LA 558.
[76] *Robertson Can Co*., 81 LA 572.
[77] Tr. on 106 (Hennessey).

Mr. Price.[78] The Union concludes: "Unfortunately, the City ignored this conclusion as it related to Mr. Hennessey's behavior and approach, and as a result the problem continued to fester."[79] Finally, the union argues that the regret and accountability Mr. Price later expressed supports reinstatement.[80]

C. The City Did Not Have Just Cause To Terminate Mr. Price As A Result Of The Three Complaints Generated In June Of 1999.

The Union continues the claim that incidents were the result of personality conflicts with Mr. Hennessey by comparing Mr. Price's record before and after Mr. Hennessey's arrival. The three formal complaints filed in June 1999 should be viewed with suspicion, the Union argues. The Union asserts that because Mr. Hennessey solicited the formalization of two of the complaints, their value is questionable. Additionally, the Union claims that Mr. Pulliam complained about the tone used by Mr. Price, and "simply felt defensive about Mr. Price's direct approach."[81] Regarding the incident with Mr. Pulliam, the Union concludes: "The testimony at the hearing revealed that the complaints are very thin, and that they do not justify any level of discipline, let alone discharge."[82]

In the situation involving Mr. Anderson, the Union utilizes the testimony of witness Robert Stone, who confirmed Mr. Price's testimony that Mr. Anderson approached Mr. Price in a hostile, abrasive manner. The Union states that Mr. Price simply responded in kind.[83]

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[78] Union's Post-Hearing Brief, on 27, Exhibit E21.
[79] Union's Post-Hearing Brief, on 27.
[80] *Id*.
[81] Union's Post-Hearing Brief, on 28.
[82] *Id*.
[83] Tr. at 222-224 (Stone), 453-454 (Price), Union's Post-Hearing Brief, on 28.

Finally, the Union points to contradictory testimony regarding Mr. Poil's complaint to refute the allegations and claims that the weight of evidence does not support a conclusion of improper action by Mr. Price. The Union concludes that even if Mr. Price is found to have been loud or boisterous, that is insufficient justification for discipline.[84]

The Union argues in conclusion that the issues should be weighed against Mr. Price's long career, when he received no complaints and earned the appreciation of his subordinates.[85]

D. The Appropriate Remedy In This Case Is Reinstatement With Back Pay And Benefits.

The Union asserts that in the absence of just cause for termination, the appropriate remedy is reinstatement of Mr. Price. In the event that the arbitrator finds that suspension was a just penalty, the Union requests that Mr. Price be awarded back pay from the conclusion of the suspension period through the date of reinstatement.

V. POSITION OF THE CITY

A. The City Had Just Cause to Terminate Mr. Price When He Failed to Attend Meetings That He Was Ordered to Attend.

The City argues that Mr. Price's failure to attend the two hearings is sufficient reason alone to terminate employment. Mr. Price chose not to attend the first June 16,

[84] Union's Post-Hearing Brief, at 29.

1999 meeting despite being ordered to attend by Mr. Chu. The City asserts that Mr. Price, while on paid leave, should understand his obligations to follow employer directives. When reaching his decision, Mr. Price should have reasonably expected discipline to result from his failing to appear.[86]

With respect to the 11:00 meeting that followed, Mr. Chu specifically warned Mr. Price of the possibility of "disciplinary action that may include termination," yet Mr. Price again chose not to attend.[87] Mr. Price chose to conduct himself in an insubordinate manner despite numerous opportunities to change. The City notes that when given a second chance to attend the meeting, Mr. Price chose not to, knowing that termination was a distinct possibility. The City contends that Mr. Price was given ample opportunity, at great cost to the City, to appear at both hearings. His decision to not attend hindered the investigation, and was "an inexcusable act of gross insubordination."[88]

The City also argues that when it complied with *Loudermill* requirements by affording Mr. Price his due process rights, again, Mr. Price failed to appear. The City argues that Mr. Price was directed to appear at the June 24, 1999 Loudermill hearing, and was given notice of the allegations against him. The City claims the document presented by Mr. Price did not address the allegations, and "argued in support of the insubordination."

B. The City Had Just Cause to Terminate Mr. Price When He Engaged in Insubordinate Behavior Toward His Supervisors.

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[85] *Id*.
[86] City's Post-Hearing Brief, at 12, 18-19 and Exhibit U34.
[87] Exhibit E26, Tr. at 146 (Chu).
[88] City's Post-Hearing Brief, at 25.

The City argues it had just cause to terminate Mr. Price when he engaged in insubordinate behavior toward his supervisors by:

> (a) failing to be supportive of management after he was specifically ordered to do so;
> (b) failing to behave in a tactful, courteous, diplomatic, and respectful manner at all times after he was specifically ordered to do so;
> (c) failing to create a work environment free of disruptions and hostility after he was specifically ordered to do so;
> (d) failing to responsibly represent his division in setting an example for his subordinates after he was specifically ordered to do so;
> (e) failing to conduct himself in accordance with City policies and procedures after he was specifically ordered to do so;
> (f) exhibiting rude, aggressive, and negative behavior towards his supervisor;
> (g) failing to provide acceptable levels of customer service as required by his supervisors;
> (h) behaving in a rude and abrasive manner toward City employee customers, which included the frequent use of foul language, of a loud and abrasive tone of voice, and finger pointing;
> (i) encouraging subordinate employees to behave in a manner unsupportive of management; and
> (j) physically assaulting and threatening his supervisor after he was specifically ordered to cease from doing so.[89]

The City asserts that Mr. Price's conduct of pointing his finger and yelling at his supervisor in a threatening manner in the presence of other employees, of not being supportive of management after being warned that his failure to do so could result in disciplinary action, and engaging in rude and abrasive behavior towards City customers after being warned that such conduct would not be tolerated, was completely inconsistent with his obligations as an employee. The City contends that this pattern of behavior provides just cause for termination, based on standards set forth in the Kent City Policy.[90]

C. Mr. Price Did Not Have The Right To The Presence Of A Private Attorney During The Meetings That Were Scheduled For June 16, 1999.

[89] City's Post-Hearing Brief, at 2.
[90] *Id*., at 3-4.

The City argues that the employment agreement between the City of Kent and Union Local #117 does not provide Mr. Price the right to a private attorney. The agreement specifically states that the Union is "the exclusive bargaining representative." The City argues that this right to union representation does not equate to a right to have representation by an attorney not affiliated with the union.[91]

The City argues Mr. Duncan appeared at the 11:00a.m. meeting on June 16, despite the fact that Mr. Chu told Mr. Price that his attorney would not be allowed to attend the meeting. [92] Mr. Duncan appeared at the 11:00a.m. meeting and refused to leave despite being told by the City that he would not be permitted to attend.

The City asserts that Mr. Price was granted numerous opportunities to attend the meeting, and the Union and Mr. Duncan are at fault for not recommending to Mr. Price that he attend. Moreover, Mr. Price was allowed Union representation, which fully complies with his rights under the agreement.

D. Mr. Price's Reliance On the Advice of A Private Attorney Did Not Have Any Bearing On the City's Determination of Just Cause.

The City argues that although Mr. Duncan advised Mr. Price not to attend the meetings, Mr. Price made the decision not to attend. For this, Mr. Price is accountable. The City states that allowing insubordination on the advice of private counsel would grant Mr. Price "immunity" and would "render the City helpless when it came to investigating employee misconduct."[93]

E. As a Mid-Level Supervisor, Mr. Price Should Be Held to A Higher Standard of Conduct.

[91] *Id*., at 31, Exhibit J1, at 1.
[92] Tr. at 401 (Duncan).
[93] City's Post-Hearing Brief, at 34.

The City argues that Mr. Price's position as supervisor required him to uphold the policies and procedures of the City and support management to a greater degree than regular employees. Mr. Price received numerous hours of training regarding City policies and procedures, and had received training to develop supervisory skills. As a mid-level supervisor, he was required to vigorously maintain a work environment consistent with the policies and procedures of the City in a manner that was supportive of the management structure that he was a part of. The City points to numerous acts by Mr. Price that violated City Policy and did not meet the standard of conduct expected of a manager.

The City summarizes Mr. Price's conduct:

> Based upon his numerous acts in disregard of the orders of his supervisors and in violation of City policies, it is clear that Mr. Price did not uphold the standard of compliance with City policies and procedures required of a person who supervises other employees. He distrusted management, and blatantly and consistently disregarded management orders. He failed to set an example to other employees, and in fact, encouraged them to be unsupportive of his supervisors.[94]

F. The City's Termination Of Mr. Price Must Be Based Upon Facts Supported By Substantial Evidence And Reasonably Believed To Be True.

The city argues that discharge for just cause is one which is not for any arbitrary, capricious, or illegal reason and which is based upon facts supported by substantial evidence and reasonably believed to be true.[95] The City further argues that evidence is substantial when it is sufficient to persuade a fair-minded person that the declared premise is true.[96] The City believes that "although the employer may not make any

[94] City's Post-Hearing Brief, at 35.
[95] *Wlasiuk v. Whirlpool Corp.,* 81 Wn. App. 163, 179, 914 P.2d 102 (1996)
[96] *Vancouver School Dist. No. 37 v. Service Employees Intern. Union*, 79 Wn. App. 905, 927, 906 P.2d 946 (1995).

arbitrary determinations for just cause, whether the employee actually committed the violation in question is irrelevant." As stated by the City in its brief "the question is whether, at the time the employee was dismissed, the employer reasonably, in good faith, and based upon substantial evidence, believed that the employee had committed the violation in question."

VI. DECISION

A. The Just Cause Standard Is One of Reasonableness.

The City asserts that because there was substantial evidence and the City believed in good faith that the Grievant was guilty of the acts alleged, the just cause standard of review is satisfied. It relies for the proposition on a test recently reviewed in *Wlasiuk v. Whirlpool Corp.*[97], revisiting a test originally articulated by the Washington State Supreme Court in *Baldwin v. Sisters of Providence*.[98] In a case involving an employer commitment made in a unilaterally implemented employee manual, the Court in *Baldwin* described just cause as existing when the facts on which an employer relies are supported by substantial evidence and are reasonably believed by the employer to be true, so long as the reason for the discharge is not arbitrary, capricious or illegal.[99]

The *Baldwin* decision was premised upon the conclusion that when an employer unilaterally adopts self-imposed limitations, then the employer should be left to make the requisite factual determinations. In this regard, our state Supreme Court quoted with approval the following reasoning by the Oregon Supreme Court:

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[97] *Wlasiuk v. Whirlpool Corp.,* 81 Wn. App. 163 (1996).
[98] *Baldwin v. Sisters of Providence,* 112 Wn.2d 127, 769 P.2d 298 (1989).
[99] *Baldwin* at 139.

> [T]here is a just cause provision, but no express provision transferring authority to make factual determinations from the employer to infer that such a meaning was intended by the terms of the Employee Handbook ….**[The handbook] is a unilateral statement** by the employer of self-imposed limitations upon its prerogatives….**[T]he meaning intended by the drafter, the employer, is controlling** and there is no reason to infer that the employer intended to surrender its power to determine whether facts constituting cause for termination exist….**In the absence of any evidence of express or implied agreement whereby the employer contracted away its fact-finding prerogative to some other arbiter, we shall not infer it.**[100]

Other cases cited by the City also involved unilaterally implemented employer policies.

The "just cause" requirement which I am called upon to apply was not gratuitously offered by the City to its employees; it was the result of a bargained agreement.[101]

Some collective bargaining agreements contain an express definition of "just cause." When the parties have thereby indicated their mutual intent, an arbitrator should apply a standard of review that is consistent with the expressed contractual intent. In this case, what constitutes "just cause" has not been defined in the contract between the City of Kent and Teamsters Local #117, and the City offered no evidence that the contractual just cause provision has been applied in any other way other than in accordance with its customary application in labor arbitrations.

When there is not any contractual definition, it is reasonably implied that the parties intended application of the generally accepted meaning that has evolved in labor-management jurisprudence: That "just cause" standard is a broad and elastic concept, involving a balance of interests and notions of fundamental fairness.

Described in very general terms, the applicable standard is one of reasonableness:

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[100] *Simpson v. Western Graphics Corp.,* 298 Or. 96, 100-101, 643 P.2d 1276 (1982)(emphasis added).
[101] Even if this analysis of the contract were to fail, I would still find the use of the phrase "just cause" to constitute a trade term with specific meaning for the contract in question.

> …whether a reasonable (person) taking into account all relevant circumstances would find sufficient justification in the conduct of the employee to warrant discharge (or discipline.)[102]

As traditionally applied in labor arbitrations, the just cause standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. An employer's good faith but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action. If misconduct is proven, another consideration, unless contractually precluded, is whether the severity of disciplinary action is reasonably related to the seriousness of the proven offense and the employee's prior record. It is by now axiomatic that the burden of proof on both issues relies with the employer.

B. The Applicable Burden of Proof is Clear and Convincing Evidence.

In this case, the employee is charged with insubordination, resulting from the employee's failure to attend two investigatory hearings while on paid leave as well as other examples of alleged misconduct. In a case involving the discharge of an employee, the burden is on the employer to sustain its allegations, and to establish that there was just cause for the termination. As the leading treatise in the area noted:

> Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority and other contractual benefits, and reputation are at stake. Because of the seriousness of the penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires "just cause" for discharge.[103]

In this context, it is appropriate for the Arbitrator to demand clear and convincing proof. As Arbitrator Richman explained:

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[102] *RCA Communications, Inc*. 29 LA 567, 571 (Harris, 1961). See also *Riley Stoker Corp*., 7 LA 764, 767 (Platt, 1947).
[103] Elkouri and Elkouri, *How Arbitration Works* 905 (5th Ed. 1987).

> The imposition of a lesser burden than clear and convincing proof fails to give consideration to the harsh effect of summary discharge upon the employee in terms of future employment.[104]

In order to meet the requirement of just cause, the City must not only establish that Mr. Price committed an offense, but also that the degree of discipline imposed was reasonably related to the seriousness of the offense. As one treatise has observed:

> Arbitrators have consistently held that an excessively harsh penalty for misconduct violates the requirement that discipline be imposed for just cause. "Inherent in the right to discipline for just cause is the requirement that the form and degree of discipline be reasonable both as regards the basis of discipline and the penalty assessed . . . ."[105]

In other words, proportionality is essential to a finding of just cause:

> The concept of just cause includes not only the proof of the commission of an offense in violation of applicable rules, but the severity of the penalty as well, which must be proportional to the offense.[106]

This principle has been specifically applied in cases involving insubordination, and arbitrators routinely modify penalties that are disproportionate:

> There is a consensus among arbitrators that employers have the right to discipline employees who are insubordinate. Discharge, however, is not the appropriate penalty in every case of insubordination. An arbitrator hearing an insubordination case has the authority to ensure that the penalty imposed by the employer is appropriate, in light of all the circumstances. This authority to modify the penalty is inherent in the arbitrator's position, although it may be modified by contract language to the contrary.[107]

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[104] *General Telephone Co. of California*, 73 LA 531, 533 (Richman, 1979). See also: *Atlantic Southeast Airlines, Inc.*, 101 LA 515 (Nolan, 1993) (using clear and convincing standard*); J. R. Simplot Co*., 103 LA 865 (Tilbury, 1994) (same); *Collins Food International, Inc*., 77 LA 483, 484-485 (Richman, 1981) (same). The Employer bears this burden of proof both with respect to proving the alleged violation, and with respect to demonstrating the appropriateness of the penalty. *Pepsi-Cola Co*., 104 LA 1141 (Hockenberry, 1995).

[105] Brand, *Discipline and Discharge in Arbitration* 86 (1998) (citing *Merchants Fast Motor Lines*, 103 LA 396, 399 (Shieber, 1994) and *Clow Water Sys. Co*., 102 LA 377 (Dworkin, 1994)).

[106] *Cummins, Inc*., 104 LA 1012, 1017 (1995); *Barnstead-Thermolyne Corp*., 107 LA 645, 653 (Pelofsky, 1996); *Capital Airlines*, 25 LA 13 (Stowe, 1955); *Huntington Chair Corp*., 24 LA 490 (McCoy, 1955).

[107] Brand, *Discipline And Discharge In Arbitration* 167 (1998).

Here, there is no contract language that limits the Arbitrator's authority to modify the penalty.

C. The City Did Not Have "Just Cause" For Terminating Mr. Price For Failing To Attend The Meetings in Question.

The Union cites numerous cases to support its two-part definition of insubordination, stating that an it is "a well-established principle that an employee cannot be terminated for insubordination unless the employee is given clear prior warning of the consequences of his refusal to follow the direct order."

In cases involving an alleged failure to cooperate in an employer's investigation, the Union applies this principle:

> Arbitrators have required employers to inform the employee as to the consequences of refusing to cooperate in an investigation as a condition to effecting discipline or discharge.[108]

The Union presented substantial testimony to support its view that the City did not inform Mr. Price that failing to attend the 7:30a.m. meeting could result in disciplinary action. When Mr. Price did not attend the 7:30a.m. meeting, Mr. Troup asked that the meeting be rescheduled and Mr. Price be notified of consequences for not appearing. Mr. Chu agreed to do so.[109] Mr. Chu then contacted Mr. Price, notified him of the 11:00a.m. meeting, and told him that failure to attend could result in disciplinary action, including termination.[110] However, it is also undisputed that Mr. Price relied on the advice of counsel in reaching his decision not to attend the 11:00 a.m. meeting.

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[108] Brand, Discipline and Discharge in Arbitration 183 (1998).
[109] Tr. on 363 (Troup), 172-176 (Chu).
[110] *Id*.

Under normal circumstances one cannot fault a grievant for following his attorney's advice.

This fact pattern places the arbitrator with a difficult decision. If I accept the Union's argument, it would logically follow that an employee should not be held accountable if he or she did not understand the consequences of refusing to follow an order. If the employee did appreciate the specific penalty resulting from his or her refusal, the employee could then weigh the consequences of insubordination and refuse to follow directions with impunity. The Arbitrator finds that this would hamper the efficiency and management of any workplace, where employees would be immune to discipline that they claim to have not anticipated.

In the case at hand, Mr. Price chose not to attend two meetings, and was warned by Mr. Chu before the 11:00a.m. meeting on June 16, 1999, that failure to attend could result in discipline, including termination. Mr. Price testified that he did not understand his status and obligations while on paid leave, despite the fact that he was made fully aware that he would still receive pay and benefits pending the investigation. The arbitrator finds that Mr. Price should have reasonably expected discipline for not following a management directive. This leaves as an open question, the level of discipline appropriate to a unique situation such as this.

D. Mr. Price's Failure To Attend Meetings Based On An Erroneous Understanding Of His Rights Should Not Result In Termination.

The Union acknowledges that an employee's failure to attend an investigatory meeting while on paid leave can subject the employee to discipline.[111] The Union again

[111] It is clear that Mr. Price did not have either a statutory or contractual right to have his attorney present during any of the meetings in question. In addition to the provisions of the contract, which provide that the Union is the exclusive representative of Mr. Price, is *Weingarten* and its progeny. *N.L.R.B. v. J.*

applies a standard of just cause wherein the discipline must be appropriate for the alleged action. Citing several arbitration cases, the Union maintains that when the action is conducted for "an innocent (albeit erroneous) reason," severe discipline has not been imposed.[112] In this case, the Union asserts that Mr. Price should not be faulted for his reasons for not attending, as his attorney advised him that he should not attend. The Union relies on the testimony of Mr. Price and his attorney, Mr. Duncan, to establish that Mr. Price did not intentionally seek to defy the City.[113]

What the Union omits is that while Mr. Price may have erroneously believed that he could not be disciplined for his actions, he also knew that he was on paid status with the City of Kent and that he had been specifically ordered by Mr. Chu to attend the meeting.[114] Despite being ordered to attend, Mr. Price chose to follow the advice of his attorney rather than the directive of his employer.[115] Mr. Price knew the nature of the allegations at the time of the first meetings[116] and the City rescheduled the meeting to 11:00 a.m., at the request of the Union, to give Mr. Price another chance to comply with

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Weingarten, Inc., 420 U.S. 251 (1974). *Weingarten* stands for the proposition that an employer violates the law when it denies an employee's request that a ***Union representative*** be present at an investigatory interview which the employee reasonably believes might result in disciplinary action. However, the right to union representation does not equate to the right to the representation of a private attorney not affiliated with the Union. In *Consolidated Casinos Corp.,* 266 N.L.R.B. 988 (1983), the administrative law judge rejected the proposition that an employee may request the presence of any person, including his personal lawyer, and, thus, invoke *Weingarten* rights. *Consolidated Casinos,* 266 N.L.R.B. at 105. The judge's ruling was based upon the premise that when an employee seeks the assistance of the Union, he does so in solidarity with other Union members and for the benefit of the Union. With regards to requesting a private attorney during an investigatory meeting, the judge held:

> An employee who requests the presence of his personal lawyer, however, is not invoking the support of the lawyer as part of a common cause with others. The lawyer is for his personal assistance. . . . Accordingly, I do not find a request for the presence of one's personal lawyer raises *Weingarten* rights.

[112] Union's Post-Hearing Brief, on 19. See *Health Care and Retirement Corp*., 105 LA 449 (Duff, 1995).
[113] Tr. on 402-403 (Duncan), 462-463 (Price).
[114] Tr. at 363 (Troup), 380 (Hanson), 461-462 (Price).
[115] Tr. at 465 (Price).
[116] Tr. at 403 (Duncan).

Mr. Chu's orders.[117] Mr. Price should look to others to make him whole for the unfortunate events surrounding the incorrect advice he received, not to his employer.

The Union's argument that Mr. Price did not attend the meetings because Mr. Duncan told him he should not, goes primarily to the severity of the penalty imposed. The Union concludes that termination is not a just punishment, because Mr. Price's failure to attend the second meeting "was not improperly motivated."[118] Accordingly, the Union believes the motivation of Mr. Price should then mitigate the severity of any discipline. In fact, the Union concludes the City may have reached a hasty decision based not on Mr. Price's actions, but those of his attorney.

Mr. Duncan and the Union representatives were entitled to expect that before the City called the meeting off, the City would make it clear that Mr. Price would be terminated for insubordination unless he came upstairs and attended the meeting without Mr. Duncan. While the record is somewhat unclear on this point, I believe that Mr. Price did not believe that he "would" (or perhaps more appropriately, "could") be subject to discipline for failing to attend the meeting.

The Union's arguments go only to mitigation of the penalty in this case, not to whether the City had just cause for discipline. A lengthy suspension would have been upheld.

E. Discharge Was Too Severe A Penalty For Mr. Price's Confrontation With His Supervisor on June 11, 1999.

[117] Tr. at 363 (Troup), Exhibit U34.
[118] Union's Post-Hearing Brief, at 21.

Mr. Price's behavior in the incident on June 11 does not justify the immediate termination of his employment. There are several factors that militate strongly against a conclusion that Mr. Price was grossly insubordinate.

First and foremost, the language that Mr. Price used was relatively mild and his behavior, while warranting discipline, was not egregious. It is undisputed that Mr. Price did not use any foul language; on the contrary, while he may have lost his temper and behaved inappropriately, there was no testimony indicating the Mr. Price used foul language (on this occasion). In addition—and this is absolutely critical—Mr. Price did not vilify Mr. Hennessey or use any invective that was personal towards Mr. Hennessey. These facts stand in stark contrast to the far more egregious facts in other arbitration cases in which the arbitrator overturned the discharge.[119]

In the *Tri-County Beverage* case, for example, the grievant had been discharged for saying ""f***" you" or "get the "f***" out of my face" in response to a supervisor's direction. Despite the fact that the employee had previously been suspended for an earlier offense, the Arbitrator ordered that the discharge be reduced to a 60-day suspension, reasoning that:

> The employee should not be discharged until and unless it is clear that he will not or cannot respond favorably to lesser penalties imposed with progressive severity.[120]

Here, Mr. Price did not use such foul language, he did not make it personal, and he has never been disciplined for insubordination. Accordingly, immediate termination without progressive discipline would have been unwarranted.

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[119] See; *Tri-County Beverage Co.*, 107 LA 557 (House, 1996); *Ball-Incon Glass Packaging Corp.*, 98 LA 1 (Volz, 1991).
[120] *Tri-County Beverage*, 107 LA at 580.

The absence of physical contact is a strong factor militating against a determination that discharge would be appropriate:

> In the majority of arbitrations examined by this Arbitrator, it appears that most cases where a discharge under circumstances similar to this case has been sustained, have been situations where there was physical contact, whether minimal or otherwise. Here it is undisputed that there was no physical contact and no threat of physical contact in the confrontation on the sixth floor. The Grievant admittedly shook his finger at the Foreman Adams but this could hardly be construed as a threat.[121]

Similar facts exist here, and the same reasoning and result follows. It is undisputed that there was no physical contact between Mr. Price and Mr. Hennessey. While Mr. Price shook his finger at Mr. Hennessey, this could hardly be construed as a threat. Mr. Price made no other physical gesture, and he did not use any threatening words. While Mr. Price's conduct on June 11, 1999, is irresponsible and deserves discipline, this arbitrator would not uphold a suspension greater than five days for this type of misconduct (absent any aggravating factors).

F. The City Did Not Have Just Cause To Terminate Mr. Price As A Result Of The Three Complaints Generated In June Of 1999.

In June of 1999, three complaints were filed concerning Mr. Price's conduct at work. Two of the complaints were formalized at the request of Mr. Hennessey.

The first complaint concerned Mr. Pulliam who complained about Mr. Price's conduct when he was checking on the status of one of his trucks. While the specifics can be found in Exhibit E10, Mr. Price sarcastically yelled across the shop floor; "I tried to shit one out Mike, but all I got was shit."[122] The Union argues that Mr. Pulliam understood that Mr. Price's meaning was innocuous: if he could have made it happen, he

[121] *Robertson Can*, 81 LA at 572.

would have, but he couldn't.[123] The Union asserts that this is a minor issue, and "one unworthy of any discipline." I disagree. Mr. Price was clearly being sarcastic in his conversation with Mr. Pulliam, a conversation that could be heard by a number of Mr. Price's subordinates. Additionally, Mr. Price's use of profanity further indicates the impropriety of the conversation. While conduct such as Mr. Price's is often acceptable on the shop floor, the grievant had been previously counseled regarding his behavior that the City considered "rude and abrasive,"[124] and is further exacerbated by the fact that Mr. Price is a member of management. The City had "just cause" to discipline Mr. Price for his conversation with Mr. Pulliam. A written warning would have been appropriate.

The next episode concerning Mr. Price involved Mr. Anderson, a City employee who was attempting to have a lawn mower repaired. While the facts are in dispute, a neutral independent witness—Robert Stone—confirmed Mr. Price's testimony that Mr. Anderson approached Mr. Price in a hostile, abrasive manner.[125] Given Mr. Anderson's approach, the Union argues "it is hardly fair to fault Mr. Price for responding in kind." While the Union's argument has validity (I would find no discipline to be appropriate if Mr. Price were Mr. Anderson's peer), Mr. Price is a member of management who has been previously counseled on this very issue. As a mid-level supervisor, he was required to maintain a work environment consistent with the policies and procedures of the City. Mr. Price's conduct in dealing with Mr. Anderson is similar to numerous other cases in which managers have been held to a higher standard than their subordinates. As stated by the arbitrator in *Meijer Inc.:*

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[122] *Tr. at 203 (Pulliam), 451 (Price)*.
[123] *Tr. at 203 (Pulliam), 451 (Price)*.
[124] Exibit E3, page 2.
[125] Tr. at 222-224 (Stone), 453-454 (Price).

> The claimant has been a management associate for long enough that he may be assumed to be fully aware of all of the company's policies and procedures. . . . The manager must consistently apply such policies to those employees he supervises. **Moreover, a manager does not have some special license to violate such policies but rather has ever greater responsibility to observe such rules "to the letter" and, like "Caesar's wife" to be above all reproach in that respect.** [126]

While I do not condone Mr. Anderson's actions, they do not excuse Mr. Price calling him a "smart ass" (even if true) and acting in a hostile manner. Accordingly, some minor discipline would be appropriate.

Finally, Mr. Poil, a Nursery Field Supervisor, complained that Mr. Price was loud and boisterous in his tone on or about May 17, 1999. However, Mr. Poil's testimony in this regard is directly contradicted by the testimony of Mr. Kleven and Mr. Price. While Mr. Price may have committed misconduct on the date in question, the City has failed to prove its case by a preponderance of the evidence; hence, there is insufficient justification for discipline.

G. Taken As A Whole, The Conduct Of The Grievant in May And June Of 1999, Provided The City With "Just Cause" For His Termination.

Looked at individually, none of the instances of misconduct committed by the grievant would justify the penalty of termination. Unfortunately, such a great deal happened in so short of time, that there was little, if any, opportunity for progressive discipline. Equally unfortunate is that some of Mr. Price's misconduct interfered with the City's ability to issue him a lower level of discipline for some of his misconduct.

[126] *Meijer Inc.,* 103 LA 265 (1994), (emphasis added).

In order to justify the City's actions in terminating the grievant, one must look at the big picture that existed at the time following Mr. Price's Loudermill hearing. Just cause exists for Mr. Price's termination, not for any one act of misconduct, but rather for numerous individual acts and events including:

1) the notice given in numerous informal warnings to Mr. Price informing him that his abusive behavior would not be tolerated;
2) the notice given to the grievant in the meeting with Bill Stephens on February 3, 1997, in which Mr. Price pounded his fists on the table and indicated that he would continue to push Mr. Stephen's buttons;
3) the notice given to grievant in the reprimand of January 22, 1998, in which Mr. Price was informed in writing that he was expected to support management and that rude, abrasive behavior would not be tolerated;
4) the written reprimand of May 20, 1998, later reduced to a verbal reprimand, requiring Mr. Price to behave in a courteous, tactful, and respectful manner at all times, requiring him to maintain a work environment free of hostility, and warning him that his failure to do so could result in termination;
5) the numerous hours and dollars spent to train Mr. Price to act in accordance with the reasonable expectations of the City;
6) the two verifiable complaints received from City customers in May / June, 1999, evidencing Mr. Price's hostile and aggressive conduct;
7) the inappropriate behavior directed by Mr. Price, towards his supervisor, Steve Hennessey, on June 11, 1999;

8) Mr. Price's failure to attend two fact-finding meetings after being directed to do so; and,

9) Mr. Price's failure to attend the Loudermill hearing after being directed to do so.

In making the determination as to whether "just cause" for Mr. Price's termination existed, it was necessary to look at all of the above factors in a global perspective. Mr. Price's failure to appear at his meetings or Loudermill hearing is troubling in itself, however, it is much more serious when one notes that these meetings were necessary to address his insubordination, the very conduct that he displayed while missing his meetings.

The grievant's altercation with Mr. Anderson also appears relatively minor until one comprehends the time and expense invested by the City in an effort to assist Mr. Price in having more productive relationships with his co-workers. In short, too much happened in too short of time for each instance of misconduct to be treated separately. Taken as a whole, Mr. Price's conduct in the summer of 1999 provide just cause for discharge.

H. Mitigation Of The Penalty Of Discharge

Finally, the Union has argued that Mr. Price acknowledges and accepts his responsibility for the conflict with Mr. Hennessy. As Mr. Price put it, "I've had enough time to think about it and I think there would have been a better way to approach the whole situation but at the time I didn't use my head. I used my mouth instead of my head."[127] The Union further contends that, "Mr. Price's sincere expression of regret and

[127] Tr. at 464-465 (Price).

his awareness of the need to behave differently further supports the conclusion that reinstatement is appropriate."

While Counsel for the Union did an excellent job of representing Mr. Price at the hearing, his case was ultimately damaged by the testimony of the grievant. Rather than finding that Mr. Price's testimony supported a finding that "Price acknowledges and accepts his responsibility for the conflict with Mr. Hennessy," I find that Mr. Price was in many ways his own worst witness. Specifically, when asked about his confrontation with Mr. Hennessy, Mr. Price says:

> I got out of my chair and got close to Steve Hennessey and I put my finger in his face and I told him I just told you I have got work to do and I don't have time to play phone tag.[128]

Continuing,:

> [t]hen he asked me to remove my hand from his face; upon saying that I put my hand just inches from his nose and I said I'm an adult, I'll put my hand where I want to.[129]

He continues:

> the only thing I can say, and I stated this earlier, is that when I moved my finger closer to his face he seemed to freeze like he didn't want a, he didn't want a confrontation; in other words, he didn't want it to go any closer than it was, you know, because like I say, my finger was within inches of his nose, and when I say inches, it's closer to 1 inch than 3 inches.

Mr. Price's testimony indicated that he was an insubordinate employee who distrusted management to the point that he could not follow reasonable directives. When asked whether he knew if he was on paid leave Mr. Price stated:

> I had Eddy write on there paid administrative leave because when I was sure when I walked out the door to go home, I was still being paid **because I wasn't going to leave that**

[128] Tr at 456 (Price).
[129] Tr at 457 (Price).

> **building unless I was being paid because he asked me to leave**…[130]

When speaking of his relationship with his supervisor, Mr. Hennessy, Price states:

> …it definitely made it hard to follow the orders to a T of somebody I knew was less than squeaky clean himself.[131]

and:

> Well, when he put more pressure on me I was putting more pressure on him; in other words, I knew that if I, if he pressured me and I pressured back, we would lock horns.[132]

Based on the testimony at the hearing as well as the demeanor of Mr. Price, there is a lack of evidence to warrant mitigation of the penalty of discharge. Even if such evidence existed, the overwhelming amount of misconduct in such a short period of time would still support the penalty imposed by the City.

VII. CONCLUSION & AWARD

The City, by clear and convincing evidence, has shown that "just cause" existed for the termination of Mr. Price and the grievance is dismissed. All fees and expenses charged by the Arbitrator shall be borne equally by the parties to the arbitration, as provided for in Article 7.1 of the parties collective bargaining agreement.

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David Gaba, Arbitrator

February 10th, 2000
Seattle, Washington

[130] Tr. at 462 (price) emphasis added.
[131] Tr. at 479 (Price).
[132] Tr. at 482 (Price.